

47

Supreme Court, U.S.

FILED

FEB 18 1994

No. 108, Original

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE AMENDED
PETITION, AMENDED PETITION FOR AN ORDER
ENFORCING DECREE, FOR INJUNCTIVE RELIEF,
AND FOR MODIFICATION OF THE DECREE TO
SPECIFY AN APPORTIONMENT OF
THE NATURAL FLOWS OF THE
LARAMIE RIVER BELOW WHEATLAND AND TO
APPORTION THE UNAPPORTIONED NATURAL
FLOWS OF THE NORTH PLATTE RIVER, AND
BRIEF IN SUPPORT OF MOTION FOR LEAVE TO
FILE AMENDED PETITION

DON STENBERG

Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS

Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN

JAY F. STEIN

SIMMS & STEIN, P.A.

430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

February 18, 1994

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

BEST AVAILABLE COPY



TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE AMENDED
PETITION

AMENDED PETITION FOR AN ORDER ENFORCING
DECREE, FOR INJUNCTIVE RELIEF, AND FOR
MODIFICATION OF THE DECREE TO SPECIFY AN
APPORTIONMENT OF THE NATURAL FLOWS OF
THE LARAMIE RIVER BELOW WHEATLAND AND
TO APPORTION THE UNAPPORTIONED
NATURAL FLOWS OF THE NORTH PLATTE
RIVER

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO
FILE AMENDED PETITION



No. 108, Original
IN THE
Supreme Court of the United States
October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE AMENDED PETITION

The State of Nebraska hereby moves for leave to file its amended petition for an order to protect and enforce the equitable apportionment established by the Court through its Decree entered in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), for injunctive relief against the State of Wyoming and the United States of America, for modification of the Decree to specify an apportionment of the natural flows of the Laramie River below Wheatland during the irrigation season, and for modification of the Decree to apportion the unapportioned

natural flows of the North Platte River during the non-irrigation season.

Respectfully submitted,

DON STENBERG

Attorney General of Nebraska

Department of Justice

2115 State Capitol

Lincoln, Nebraska 68509-8920

(402) 471-2682

RICHARD A. SIMMS

Counsel of Record

Special Assistant Attorney General

JAMES C. BROCKMANN

JAY F. STEIN

SIMMS & STEIN, P.A.

430 West San Francisco Street

Post Office Box 280

Santa Fe, New Mexico 87504

(505) 983-38802



No. 108, Original

IN THE
Supreme Court of the United States
October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

AMENDED PETITION FOR AN ORDER
ENFORCING DECREE, FOR INJUNCTIVE RELIEF,
AND FOR MODIFICATION OF THE DECREE TO
SPECIFY AN APPORTIONMENT OF
THE NATURAL FLOWS OF THE
LARAMIE RIVER BELOW WHEATLAND
AND TO APPORTION THE UNAPPORTIONED
NATURAL FLOWS OF THE
NORTH PLATTE RIVER

The State of Nebraska hereby petitions the Court for an order protecting and enforcing the equitable apportionment established by the Court through the provisions of its Decree of October 8, 1945, *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), as interpreted on April 20, 1993, *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), granting injunctive relief against the State of Wyoming and the United States of America, modifying the Decree to specify an apportionment of the natural flows of the Laramie River below Wheatland during the irrigation season, and apportioning the unapportioned natural flows

of the North Platte River during the non-irrigation season. In support hereof, Nebraska states:

COUNT I

1. In *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), the Court equitably apportioned the natural flows of the North Platte River during the irrigation season, and partially apportioned the natural flows during the non-irrigation season, among the states of Nebraska, Wyoming, and Colorado, except that it did not affirmatively preclude depletion of the contributions of the Laramie River to the critical Guernsey Dam to Tri-State Dam reach of the North Platte River, notwithstanding that such flows were expected to continue.

2. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), specifies the State of Colorado's equitable apportionment in its entirety, during the irrigation season and during the non-irrigation season, by enjoining Colorado: (a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 145,000 acres of land in Jackson County, Colorado, during any one irrigation season; (b) from storing more than 17,000 acre feet of water from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year; and (c) from exporting more than 60,000 acre feet of water out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, in any period of 10 consecutive years.

3. In *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), the Court equitably apportioned the natural flows of the North Platte River during the irrigation season in the Guernsey Dam to Tri-State Dam reach of the river, 75% to Nebraska and 25% to Wyoming, and imposed restrictions on the use of the waters of the North Platte River and certain of its tributaries in Wyoming

to ensure, to the extent possible, that dependable and usable inflows would accrue to the reach from the upstream reaches and through accretions within the reach.

4. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), contained only those injunctions deemed necessary in 1945 to ensure that dependable and usable inflows would accrue to the Guernsey Dam to Tri-State Dam reach from the upstream reaches and through accretions within the reach to effectuate the apportionment of the total natural flows in the reach.

5. The Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), expressly declined to impose additional injunctions on the use or development of the natural flows rising above and within the Guernsey Dam to Tri-State Dam reach of the river in the absence of a contemporaneous threat of development, notwithstanding that the flows were expected to continue to provide dependable and usable inflows that would accrue to the reach from upstream reaches and through accretions within the reach.

6. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981, as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), did not specify the apportionment of the contributions of the Laramie River accruing within the Guernsey Dam to Tri-State Dam reach by injunction or other restrictions because there was no contemporaneous threat of further depletions to those flows.

7. While the Court in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), did not apportion storage water, except as specified in ¶ XVII of the Decree, the equitable apportionment was premised on the recognition that Pathfinder, Seminoe, Alcova, Guernsey, and Glendo reservoirs store North Platte River water and would be operated to serve the same lands for which natural flows are apportioned, as well as for certain other lands in Nebraska and Wyoming.

8. Pursuant to *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), the Decree enjoins

the storage of waters other than in accordance with the relative priorities, as among themselves, of Pathfinder, Guernsey, Seminoe, Alcova, and Glendo reservoirs, defined and fixed in that order, and provides that these reservoirs be operated junior to the priorities of the French Canal and the State Line Canals.

9. Pursuant to *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), the Inland Lakes have a right to accrue 46,000 acre feet of natural flow in the lakes during the months of October, November, and April, with a priority date of December 6, 1904, and to temporarily store the water in Glendo and Guernsey reservoirs during the non-irrigation season.

10. Pursuant to *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), the Decree requires Wyoming to prepare and maintain complete and accurate records of the total area of land irrigated and the storage of the water of the North Platte River and its tributaries.

11. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established by the Court by depleting the natural flows of the North Platte River by:

- a. The proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

- b. Reducing the flow of tributaries entering the North Platte River below Alcova by means of groundwater development, the depletion of return flows, and the construction of reservoirs;

- c. Reducing the flow of tributaries and the mainstem in Wyoming, as well as canal and lateral flows reaching Nebraska, by the present and future effects of existing groundwater development and by potential groundwater development for municipal, industrial, and irrigation pur-

poses which would result from favorable action on pending applications to appropriate; and

d. Failing to maintain complete and accurate records of water uses set forth in the Decree as is necessary to monitor compliance with the Decree.

12. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established by the Court by depleting the natural flows of the North Platte River by such projects as the proposed Deer Creek Project, reregulating reservoirs and canal linings in the Goshen Irrigation District and the Horse Creek Conservancy District, and by permitting unlimited depletion of groundwater that is hydrologically connected to the North Platte River and its tributaries.

13. The current and imminent actions of the State of Wyoming contravene the Court's opinions in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), and the Court's decision in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), and upset the equitable balance of the North Platte River established in the Decree.

14. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and continues to upset the equitable apportionment established by the Court through the provisions of its Decree.

15. The State of Wyoming's present and threatened actions are causing and will cause irreparable injury to the State of Nebraska and its citizens.

16. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to protect and enforce the equitable apportionment and to restrain further violations of the Decree by the State of Wyoming.

17. The Court expressly retained jurisdiction to resolve the present controversy in ¶ XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

* * *

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

* * *

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-72.

WHEREFORE, the State of Nebraska prays that the Court enter its order requiring the State of Wyoming to comply with the provisions of the Decree of October 8, 1945, as modified on June 15, 1953, and interpreted on April 20, 1993, and enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree.

COUNT II

1. The allegations of Count I are adopted and incorporated herein.

2. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), apportioned the natural flows of the North Platte River among the states of Nebraska, Wyoming, and Colorado during the irrigation season, except for the inflows of the Laramie River to the Guernsey Dam to Tri-State Dam reach, and partially apportioned the natural flows during the non-irrigation season.

3. As amended in *Nebraska v. Wyoming*, 345 U.S. 981 (1953), the Decree states that the State of Wyoming, pursuant to contracts entered between irrigation water users and the U.S. Bureau of Reclamation, is entitled to 15,000 acre feet of Glendo Reservoir storage water to be used for the irrigation of lands in the North Platte River Basin in southeastern Wyoming below Guernsey Dam.

4. The United States is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by contracting for the use of Glendo Reservoir water for other than authorized purposes in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir.

5. The current and imminent actions of the United States violate the Decree and upset the equitable balance of the North Platte River established by the Court.

6. Despite the State of Nebraska's efforts to resolve these matters, the United States has refused to alter its actions and continues to violate the Decree.

7. The United States' present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

8. The State of Nebraska has no effective remedy at law to enforce its rights against the United States. Injunctive

relief is necessary to enforce the Decree and to restrain further violations by the United States.

WHEREFORE, the State of Nebraska prays that the Court enter its order construing the Decree and requiring the United States to comply with the provisions of the Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), and enjoining the United States from violating the State of Nebraska's apportionment under the Decree.

COUNT III

1. The allegations of Counts I and II are adopted and incorporated herein.

2. While the Court's decision in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), establishes that the inflows of the Laramie River to the Guernsey Dam to Tri-State Dam reach of the North Platte River during the irrigation season were not affirmatively specified as part of the apportionment of the inflows accruing to the reach from the upstream reaches and the other accretions within the reach, the decision recognizes that the Court in 1945 "expected that some Laramie water would contribute to the natural flows available for apportionment in the [Guernsey Dam to Tri-State Dam] reach." *Nebraska v. Wyoming*, 113 S.Ct. at 1698.

3. The Grayrocks Project is a post-Decree reservoir located in Wyoming on the Laramie River below Wheatland, operated by Basin Electric Power Cooperative. During construction of the project, the State of Nebraska challenged its legality. *Nebraska v. Rural Electrification Admin.*, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978), *appeal dismissed*, 594 F.2d 870 (8th Cir. 1979). The litigation was settled by an agreement entitled Agreement of Settlement and Compromise dated December 4, 1978 ("Grayrocks Settlement Agreement"). In exchange for Basin Electric guaranteeing to operate the project to ensure the delivery of specified quantities of water to the confluence of the Laramie and North Platte rivers, Nebraska and other plaintiffs agreed to

withdraw their objections to the project. The State of Wyoming, while encouraged to participate in the Agreement in order to resolve any outstanding controversies, refused to become a party to the litigation or the Grayrocks Settlement Agreement.

4. The State of Nebraska has historically relied on and continues to rely on the contributions of the Laramie River to the North Platte River as an important component of the natural flows apportioned in the critical Guernsey Dam to Tri-State Dam reach, in satisfaction of the guaranteed minimum stream flows set forth in the Grayrocks Settlement Agreement, and for other equities below Tri-State Dam in Nebraska that rely on the Laramie inflows to the North Platte River during the irrigation and non-irrigation seasons.

5. Wyoming has refused to honor, and has in fact sanctioned depletions, of the minimum flows guaranteed by the Grayrocks Settlement Agreement.

6. The State of Wyoming is presently causing injury to and threatens to further injure beneficial uses of and equitable reliance on the inflows of the Laramie River in existence before and after the entry of the Decree in 1945, including depletions of the minimum flows guaranteed by the Grayrocks Settlement Agreement by:

a. The proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers;

b. The construction and use of new pumping facilities on the Laramie River;

c. The construction of facilities to reregulate, store, and consume return flows;

d. Reducing the inflows of the Laramie River and its tributaries in Wyoming by the present and future effects of existing and threatened groundwater development; and

e. Additional activities which reduce the natural flows of the Laramie River to the North Platte River.

7. The State of Wyoming is presently causing injury to and threatens to further injure beneficial uses of and equitable reliance on the inflows of the Laramie River in existence before and after the entry of the Decree in 1945, including depletions of the minimum flows guaranteed by the Grayrocks Settlement Agreement, by such projects as the proposed Corn Creek Project, Goshen Irrigation District's river pumps, groundwater pumping, and surface water depletions.

8. The current and imminent actions of the State of Wyoming contravene the Court's opinions in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), and the Court's recent decision, *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), upset the equitable balance of the North Platte River established in the Decree, threaten the continuation of the guaranteed minimum flows set forth in the Grayrocks Settlement Agreement, and threaten to upset the equitable reliance on North Platte River waters in Nebraska.

9. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and continues to upset Nebraska's equitable apportionment and threaten Nebraska's equitable reliance on these waters.

10. The State of Wyoming's present and threatened actions are causing and will cause irreparable injury to the State of Nebraska and its citizens.

11. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to protect equitable interests in Nebraska and to restrain further violations by the State of Wyoming.

12. The Court expressly retained jurisdiction to resolve the present controversy in ¶ XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

* * *

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-72.

WHEREFORE, the State of Nebraska prays that the Court specify that the inflows of the Laramie River below Wheatland are a component of the equitable apportionment of the natural flows in the Guernsey Dam to Tri-State Dam reach, 75% to Nebraska and 25% to Wyoming, and enjoin the State of Wyoming from depleting Nebraska's equitable share of the Laramie River's contribution to the North Platte River and from impeding or interfering with releases of water from Grayrocks Dam and Reservoir pursuant to the Grayrocks Settlement Agreement.

COUNT IV

1. The allegations of Counts I, II, and III are adopted and incorporated herein.

2. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), equitably apportions the natural flows of the North Platte River during the irrigation season among the states of Nebraska, Wyoming, and Colorado, except that it does not specify an apportion-

ment of the contributions of the Laramie River to the critical Guernsey Dam to Tri-State Dam reach of the North Platte River, notwithstanding that such flows were expected to continue.

3. The Court in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), partially apportioned the natural flows of the North Platte River during the non-irrigation season by regulating the storage or accrual of natural flow by:

a. Enjoining Wyoming from storing more than 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above Pathfinder Reservoir during each water year, i.e., October 1 through September 30;

b. Enjoining Colorado from storing more than 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, during each water year;

c. Enjoining Wyoming from storing water out of priority with respect to specified reservoirs, except for out of priority storage or releases from Seminoe Reservoir for the generation of electricity if such storage or releases do not materially interfere with irrigation by the French Canal and the State Line Canals;

d. Enjoining Colorado from exporting more than 60,000 acre feet of water out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, in any period of 10 consecutive years; and

e. Apportioning the accrual of 46,000 acre feet during the months of October, November, and April to Nebraska for storage in the Inland Lakes.

4. The Decree specifies the State of Colorado's equitable apportionment in its entirety, during the irrigation season and during the non-irrigation season.

5. Except as specified in ¶ 3, *supra*, the non-irrigation season flows of the North Platte River were not equitably apportioned in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), notwithstanding that the Court sought to balance the equities among the states of Nebraska, Wyoming, and Colorado to provide certainty and resolve future disputes.

6. Since the equitable apportionment was effectuated in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), there have been changes in conditions making modification of the Decree or the granting of further relief necessary and appropriate.

7. Since the entry of the Decree, the unapportioned non-irrigation season flows of the North Platte River have been and continue to be relied upon by equitable interests in the State of Nebraska, including irrigation, hydroelectric power production, water-cooled electric power production, municipalities, recreation, and fish and wildlife, including endangered and threatened species.

8. The demand for unapportioned non-irrigation season flows by equities in Nebraska presently beneficially using such water exceeds the supply.

9. Numerous existing and proposed developments in Wyoming threaten to utilize and deplete the unapportioned non-irrigation season flows of the North Platte River.

10. It is necessary to apportion the unapportioned non-irrigation season flows of the North Platte River to protect downstream equities in Nebraska from upstream development in Wyoming which threatens to deplete these critical but unprotected non-irrigation season flows.

11. As part of the Grayrocks Settlement Agreement entered in 1978, Basin Electric guaranteed to operate the Grayrocks Project to deliver specified quantities of water to the confluence of the Laramie and North Platte rivers during the non-irrigation season.

12. The State of Nebraska has historically relied on and continues to rely on the non-irrigation season contributions of the Laramie River to the North Platte River guaranteed by the Grayrocks Settlement Agreement.

13. The State of Wyoming's existing and proposed actions have depleted and threaten to further deplete the minimum non-irrigation season flows guaranteed by the Grayrocks Settlement Agreement.

14. The allegations contained in this count do not constitute assertions by the State of Nebraska that the storage of water in Grayrocks Reservoir, the present depletions therefrom for the purposes of the Grayrocks Project, or the passage through or release of waters from the Grayrocks Reservoir in accordance with the Grayrocks Settlement Agreement, constitute injuries to Nebraska's claim to an equitable share of the non-irrigation season flows of the North Platte River.

15. The current and imminent actions of the State of Wyoming infringe upon Nebraska's equitable share of the North Platte River during the non-irrigation season.

16. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and has continued to assert its alleged right to infringe upon Nebraska's equitable share of the North Platte River during the non-irrigation season.

17. The State of Wyoming's present and threatened actions are causing and will cause irreparable injury to the State of Nebraska and its citizens.

18. The State of Nebraska has no effective remedy at law to enforce its equitable rights against the State of Wyoming. A determination of each state's equitable share and injunctive relief are necessary to restrain further infringement by Wyoming on Nebraska's equitable share of the North Platte River.

19. The Court expressly retained jurisdiction to resolve the present controversy in ¶ XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

* * *

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-72.

WHEREFORE, the State of Nebraska prays that the Court equitably apportion the unapportioned non-irrigation season flows of the North Platte River between Nebraska and Wyoming and that the Court enjoin the State of Wyoming from depleting Nebraska's equitable share of the North Platte River during the non-irrigation season.

Respectfully submitted,

DON STENBERG

*Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682*

A handwritten signature in dark ink, appearing to read 'R. A. Simms', is written over a horizontal line.

RICHARD A. SIMMS

*Counsel of Record
Special Assistant Attorney General*

JAMES C. BROCKMANN

JAY F. STEIN

SIMMS & STEIN, P.A.

*430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880*



No. 108, Original

IN THE
Supreme Court of the United States
October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE AMENDED PETITION

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

February 18, 1994

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	3
ARGUMENT.....	7
I. THE COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION OVER NEBRASKA'S AMENDED PETITION.....	7
II. THE STANDARDS FOR ACCEPTING A PETITION DO NOT INVOKE THE BURDEN ON PROOF ON THE MERITS	11
III. THE COURT SHOULD RESOLVE ALL ISSUES RELATING TO WYOMING'S AND THE UNITED STATES' VIOLATIONS OF THE DECREE.....	14
IV. THE COURT MUST EQUITABLY APPORTION THE FLOWS OF THE LARAMIE TO PROTECT NEBRASKA'S APPORTIONMENT	17
V. CONFLICTING CLAIMS BETWEEN NEBRASKA AND WYOMING TO AN OVER- APPROPRIATED RIVER CREATE A JUSTICIABLE ORIGINAL ACTION.....	23
CONCLUSION	30

TABLE OF AUTHORITIES
FEDERAL CASES

	Page
<i>Alabama v. Arizona</i> , 291 U.S. 286 (1934)	12, 13
<i>Arizona v. New Mexico</i> , 425 U.S. 794 (1976)	9, 10
<i>Babbitt v. United Farm Workers Nat'l Union</i> , 442 U.S. 289 (1979)	9
<i>Colorado v. Kansas</i> , 320 U.S. 383 (1943)	12, 17
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982)	12, 13, 19, 23
<i>Connecticut v. Massachusetts</i> , 282 U.S. 660 (1931)	12
<i>Cuffy v. Getty Refining & Marketing Co.</i> , 648 F. Supp. 802 (D. Del. 1986)	15
<i>Evans Prods. Co. v. West Am. Ins. Co.</i> , 736 F.2d 920 (3d Cir. 1984)	15
<i>Foman v. Davis</i> , 371 U.S. 178 (1962)	14
<i>Granus v. N. Am. Philips Lighting Corp.</i> , 821 F.2d 1253 (6th Cir. 1987)	14
<i>Hinderlider v. La Plata River & Cherry Creek Ditch Co.</i> , 304 U.S. 92 (1938)	21
<i>Illinois v. City of Milwaukee</i> , 406 U.S. 91 (1972)	9, 10
<i>Kansas v. Colorado</i> , 185 U.S. 125 (1902)	13, 16
<i>Kansas v. Colorado</i> , 206 U.S. 46 (1907)	13, 17
<i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981)	8, 9, 10
<i>Middle Atl. Utils. Co. v. S.M.W. Dev. Corp.</i> , 392 F.2d 380 (2d Cir. 1968)	14
<i>Missouri v. Illinois</i> , 200 U.S. 496 (1906)	12

	Page
<i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945), <i>modified</i> , 345 U.S. 981 (1953)	1, 13, 14, 15, 16, 17, 18, 19, 23
<i>Nebraska v. Wyoming</i> , 345 U.S. 981 (1953)	17, 19
<i>Nebraska v. Wyoming</i> , 479 U.S. 1051 (1987)	1
<i>Nebraska v. Wyoming</i> , 481 U.S. 1011 (1987)	1
<i>Nebraska v. Wyoming</i> , 492 U.S. 903 (1989)	4
<i>Nebraska v. Wyoming</i> , 112 S.Ct. 1930 (1992)	4
<i>Nebraska v. Wyoming</i> , 113 S.Ct. 1689 (1993)	2, 3, 5, 12, 16, 17, 18, 19
<i>Nebraska v. Wyoming</i> , 113 S.Ct. 1941 (1993)	2, 3, 6
<i>New York v. Illinois</i> , 274 U.S. 488 (1927)	7, 9
<i>New York v. New Jersey</i> , 256 U.S. 296 (1921)	12
<i>North Dakota v. Minnesota</i> , 263 U.S. 365 (1923)	12
<i>Ohio v. Kentucky</i> , 410 U.S. 641 (1973)	8, 11
<i>Ohio v. Wyandotte Chems. Corp.</i> , 401 U.S. 493 (1971)	10
<i>Oklahoma ex rel. Johnson v. Cook</i> , 304 U.S. 387 (1938)	7
<i>Oklahoma v. Atchison, T. & S.F. Ry. Co.</i> , 220 U.S. 277 (1911)	7
<i>Oklahoma v. Texas</i> , 253 U.S. 465 (1920) ..	16, 17
<i>Pennsylvania v. West Virginia</i> , 262 U.S. 553 (1923)	8

	Page
<i>R.E.B., Inc. v. Ralston Purina Co.</i> , 525 F.2d 749 (10th Cir. 1975)	14
<i>In re Summers</i> , 325 U.S. 561 (1945)	8
<i>Texas v. Florida</i> , 306 U.S. 398 (1939)	7, 9
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983)	10
<i>United States v. Nevada</i> , 412 U.S. 534 (1973)	9, 10
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	8
<i>United States v. Texas</i> , 143 U.S. 621 (1892)	8
<i>United States v. Texas</i> , 162 U.S. 1 (1896)	16
<i>United States v. Texas</i> , 339 U.S. 707 (1950)	16, 17
<i>United States v. United States Smelting Ref. & Mining Co.</i> , 339 U.S. 186 (1950) ...	23
<i>Washington v. Oregon</i> , 297 U.S. 517 (1936)	12, 13, 19, 23
<i>Wyoming v. Colorado</i> , 259 U.S. 419 (1922)	13, 17, 18, 19, 24
<i>Wyoming v. Colorado</i> , 286 U.S. 494 (1932)	17
<i>Wyoming v. Colorado</i> , 298 U.S. 573 (1936)	17
<i>Wyoming v. Colorado</i> , 309 U.S. 572 (1940)	17

DOCKETED CASES

<i>Kansas v. Colorado</i> , No. 105, Original	17
<i>Nebraska v. Wyoming</i> , No. 108, Original ...	17

STATUTES AND COURT RULES

Colorado River Compact, 42 Stat. 171 (enacted 1921, signed 1922)	18
Republican River Compact, 57 Stat. 86 (enacted 1943, signed 1942) ..	18
U.S. Const. art. III, § 2	7, 8, 23
Supreme Court Rule 17.2	14
Fed. R. Civ. P. 15(a)	14
Wyo. Stat. § 41-2-112 (1977)	27

MISCELLANEOUS

Note, <i>Original Jurisdiction of the United States Supreme Court</i> , 11 Stan. L. Rev. 665 (1959)	10
1 W.A. Hutchins, <i>Water Rights Laws in the Nineteen Western States</i> 445-48 (1971)	20
J.W. Moore & R.D. Freer, <i>Moore's Federal Practice</i> ¶15.08 [2] (2d ed. 1990)	14

No. 108, Original

IN THE
Supreme Court of the United States
October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE AMENDED PETITION

INTRODUCTION

The State of Nebraska moved for leave to file its petition to reopen *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), to address violations of the Decree by Wyoming.¹ The Court granted Nebraska's motion. *Nebraska v. Wyoming*, 479 U.S. 1051 (1987). Wyoming filed its answer and a motion for leave to file a counterclaim.² The Court granted Wyoming's motion. *Nebraska v. Wyoming*, 481 U.S. 1011 (1987). On April 20, 1993, the

¹Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for Injunctive Relief, and Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief (Oct. 6, 1986) ("Nebraska's Petition").

²Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim (Mar. 18, 1987) ("Wyoming's Counterclaim").

Court issued its opinion on cross-motions for summary judgment. *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993). As a result of the Court's decision, certain issues raised in Nebraska's Petition and in Wyoming's Counterclaim were resolved, certain issues remained unchanged and will proceed to trial, and other issues were substantially transformed.

On October 9, 1991, Nebraska filed a motion for leave to file an amended petition.³ On April 26, 1993, the Court denied without prejudice Count I of the 1991 Amended Petition which sought an apportionment of the unapportioned non-irrigation season flows of the North Platte River. *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). Counts II and III of the motion for leave to file amended petition, which allege violations of the Decree by Wyoming and the United States, were referred to Special Master Olpin. *Id.*

As a result of the Court's decision on the cross-motions for summary judgment, the Court's order relating to Nebraska's motion to amend petition, continuing discovery, and certain intervening events, Nebraska is filing this motion for leave to amend its Petition. To conform its pleadings to the Court's decisions and in the interest of clarity and conciseness, this Amended Petition would replace and supersede Nebraska's Petition and Nebraska's 1991 Amended Petition.

Count I of this Amended Petition repeats allegations from Nebraska's Petition — matters on which the Court has already granted leave to file — and modifies allegations from Count II of Nebraska's 1991 Amended Petition. Count II of this Amended Petition alleges a violation of the

³Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims, Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims, and Brief in Support of Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (Oct. 9, 1991) ("Nebraska's 1991 Amended Petition").

Decree by the United States. Count III of this Amended Petition replaces the allegations in Nebraska's Petition regarding the Laramie River, modified to account for the Court's decision on the cross-motions for summary judgment. See 113 S.Ct. 1689. Count IV of this Amended Petition is a renewal of Count I of Nebraska's 1991 Amended Petition — the motion to apportion the unapportioned non-irrigation season flows. Special Master Olpin recommended that the Court deny without prejudice Nebraska's initial motion in this regard on ripeness grounds.⁴ The Court did so. 113 S.Ct. 1941. As a result of the resolution of certain issues and the substantive transformation of other issues in this case to date, an equitable distribution of non-irrigation flows is now ripe for resolution. Finally, Count III of Nebraska's 1991 Amended Petition — allegations of Decree violations by the United States — would be partially withdrawn if this motion is granted.

STATEMENT OF THE CASE

Nebraska's original Petition sought to address various violations of the Decree by Wyoming. Nebraska alleged that Wyoming was violating the Decree and threatening to upset Nebraska's equitable apportionment established by the Court by depleting the flows of the Laramie River, by constructing the proposed Deer Creek Project, and by actions of Wyoming officials to prevent the continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska. Wyoming's Counterclaim alleged that Nebraska was violating the Decree by diverting natural flow in excess of present beneficial use requirements, by demanding and diverting natural flow and storage water from above Tri-State Dam

⁴Letter from Owen Olpin, Special Master, *Nebraska v. Wyoming*, No. 108, Original, to The Honorable Justice Byron R. White, The Supreme Court of the United States at 6 (Apr. 9, 1992) ("Master Olpin's letter to the Court Regarding Nebraska's Motion for Leave to File").

for uses below the dam that are not authorized, and by using Glendo storage water in a manner not authorized by the Decree.

Based on the issues as framed in Nebraska's Petition and Wyoming's Counterclaim, Wyoming filed a motion for summary judgment on September 11, 1987, seeking a summary resolution of the entire case, except its counterclaim. The Special Master denied each element of Wyoming's motion and reported his decision to the Court in the First Interim Report of Special Master, dated June 14, 1989. The Court did not invite exceptions to the First Interim Report, but rather accepted it for filing without modification. *Nebraska v. Wyoming*, 492 U.S. 903 (1989).

After a period of extensive discovery, cross-motions for summary judgment were filed by Nebraska, Wyoming, Colorado, and the United States in February and March of 1991, relating to all aspects of the case. On April 9, 1992, Special Master Olpin made several recommendations to the Court in the Special Master's Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention. Master Olpin recommended that all of Wyoming's and Colorado's motions for summary judgment be denied. He further recommended that the Court grant Nebraska's and the United States' motions for summary judgment with respect to the Inland Lakes issues and that it grant Nebraska's motion for summary judgment with respect to the lack of limitations on individual canal diversions. The Master recommended that other aspects of Nebraska's motion for summary judgment be denied.

The Court invited the parties to file exceptions to the Special Master's First and Second Interim Reports. *Nebraska v. Wyoming*, 112 S.Ct. 1930 (1992). Exceptions were filed by Wyoming, Colorado, and Nebraska in July of 1992. Oral argument on the exceptions was held before the Court on January 13, 1993. The Court issued its opinion on the cross-motions for summary judgment on April 20, 1993. See 113

S.Ct. 1689. The Court accepted Special Master Olpin's recommendations in nearly all respects.⁵

Subsequent to the filing of the cross-motions for summary judgment, Nebraska filed a motion for leave to file an amended petition with the Court on October 9, 1991. Count I of the amended petition sought an apportionment of the unapportioned non-irrigation season flows of the

⁵The Court denied Wyoming's motion for summary judgment relating to the proposed Deer Creek Project, finding that genuine issues of material fact require trial. 113 S.Ct. at 1699-1700. Additionally, while the Court did not resolve the meaning of ¶ X, which Wyoming contended was a blanket exemption for its project, it was "troubled by Paragraph X." *Id.* at 1699.

Nebraska's and the United States' motions relating to the Inland Lakes were granted by the Court. *Id.* at 1696-97. The Court found that the Inland Lakes have a right to accrue 46,000 acre feet of natural flow in the lakes during the months of October, November, and April, with a priority date of December 6, 1904. *Id.* at 1697. The Inland Lakes were also allowed to temporarily store the water in Glendo and Guernsey reservoirs during the non-irrigation season. *Id.*

With respect to the Laramie River, the Court denied Wyoming's and Nebraska's motions for summary judgment. *Id.* at 1697-99. The Court found that the Laramie River was unapportioned by the Court in 1945, notwithstanding that its contributions were used as part of the calculus to determine the apportionment in the critical Guernsey Dam to Tri-State Dam reach and that such flows were expected to continue. *Id.* at 1698. The Court stated that the relief which Nebraska sought — restrictions on Wyoming's use of the Laramie River — would constitute a modification of the Decree. *Id.* at 1698-99.

The Court denied the cross-motions for summary judgment with respect to most of the Tri-State matters. *Id.* at 1700. There was one important exception. The Court granted Nebraska's motion for summary judgment which sought an interpretation of ¶ V of the Decree. *Id.* at 1700-01. The Court agreed with Nebraska and found that the Decree did not contain limitations on individual canal diversions, but rather allowed Nebraska to use its 75% apportionment in the Guernsey Dam to Tri-State Dam reach according to its discretion. *Id.*

North Platte River. Counts II and III of the 1991 Amended Petition alleged further violations of the Decree by Wyoming, and, for the first time, violations of the Decree by the United States. After the parties and *amici* briefed this matter, Special Master Olpin *sua sponte* wrote a letter to the Court containing a recommendation on Count I of Nebraska's 1991 Amended Petition:

While Nebraska is convincing on the importance of the North Platte's unapportioned non-irrigation season flows and while the threshold adopted by the Court's majority in 1945 arguably has been met, I nonetheless recommend that Nebraska's motion be denied without prejudice on ripeness grounds. . . . The time will likely come when a year around apportionment will be needed, but for now I recommend going forward with the discrete claims that are already before the Court, some of which do involve non-irrigation season natural flows. The resolution of those discrete claims will inform any subsequent proceeding dealing more comprehensively with the apportionment of non-irrigation season flows.

Master Olpin's letter to the Court Regarding Nebraska's Motion for Leave to File at 6. On April 26, 1993, the Court denied without prejudice Nebraska's Motion for Leave to File with respect to Count I and referred Counts II and III to the Special Master for his recommendation. 113 S.Ct. 1941.

Following the Court's decision on April 20, 1993, and its order of April 26, 1993, Master Olpin convened a status conference in June of 1993, to discuss various pretrial matters. The conference included a discussion of the procedure for preparing the Master's recommendation to the Court on Counts II and II of Nebraska's 1991 Amended Petition. During the conference, it became apparent that at least two of the parties contemplated possible pleading amendments as a result of the Court's April decisions and prior discovery. A subsequent order entered by Master

Olpin set February 4, 1994, as the deadline for filing proposed pleading amendments. The deadline was later changed to February 18, 1994.

To encourage judicial economy and a speedy resolution of their pleading amendments, the states of Nebraska and Wyoming cooperated in the drafting of a joint motion to refer which is being filed simultaneously with this motion, the Amended Petition and brief, and Wyoming's proposed amendments to its counterclaim. If the Court grants the joint motion to refer, the Special Master will set a schedule for further briefing and make his recommendations to the Court in due course. If the Court denies the motion, the parties will proceed pursuant to the Court's order.

ARGUMENT

POINT I

THE COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION OVER NEBRASKA'S AMENDED PETITION

Nebraska has properly invoked the Court's original jurisdiction over its amended petition. Under U.S. Const. art. III, § 2, Nebraska must establish that it is not a nominal party and that the Amended Petition presents a justiciable "case or controversy."⁶ See *Texas v. Florida*, 306 U.S. 398 (1939); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-96 (1938); *New York v. Illinois*, 274 U.S. 488, 489-90 (1927).

The Court has jurisdiction to hear actions between states if the matter in dispute presents a justiciable "case or

⁶It should be clear that Nebraska is not a "nominal" party actually representing private interests. See *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-96 (1938); *Oklahoma v. Atchison, T. & S.F. Ry. Co.*, 220 U.S. 277, 288-89 (1911). Nebraska's interests *parens patriae* embrace agricultural, municipal, industrial, recreational, environmental, and fish and wildlife interests along the North Platte and Platte Rivers.

controversy" under art. III, § 2 of the United States Constitution. In *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court wrote:

The Constitution provides for this Court's original jurisdiction over cases in which a "State shall be a Party." Art. III, § 2, cl. 2. Congress has in turn provided that the Supreme Court shall have "original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251 (a) (1976 ed., Supp. III). In order to constitute a proper "controversy" under our original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence."

451 U.S. at 735-36 (citations omitted). See also *Pennsylvania v. West Virginia*, 262 U.S. 553, 591-92 (1923); *United States v. Texas*, 143 U.S. 621, 644-46 (1892). The Court's original jurisdiction is broadly construed to embrace all issues within a "case or controversy" under U.S. Const. art. III, § 2, to "reach and argue the merits of the controversy presented . . . dispos[ing] of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigant must bear." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

A "controversy" is not a mere disagreement, but rather the kind of controversy courts are called upon to resolve.⁷ See *United States v. Nixon*, 418 U.S. 683, 696 (1974). Specifically, a controversy must be appropriate for judicial determination, definite and concrete, involving the legal

⁷"Case" has been defined as "any question respecting the Constitution, treaties or laws of the United States [which] has assumed 'such a form that the judicial power is capable of acting on it.' " See *In re Summers*, 325 U.S. 561, 566-67 (1945).

relations of parties having adverse legal interests, and admitting of specific relief through a decree of conclusive character. In *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979), the Court noted that one " 'does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.' " 442 U.S. at 298 (citations omitted).

Similarly, in original actions, the controversy must arise from "an actual or presently threatened interference with the rights of another." *New York v. Illinois*, 274 U.S. at 489-90. As the Court put it in *Texas v. Florida*:

... [O]ur constitutional authority to hear the case and grant relief turns on the question whether the issue framed by the pleadings constitutes a justiciable "case" or "controversy" within the meaning of the Constitutional provision, and whether the facts alleged and found afford an adequate basis for relief according to accepted doctrines of the common law or equity systems of jurisprudence, which are guides to decision of cases within the original jurisdiction of this Court.

306 U.S. at 405 (citations omitted).

The Court has also held that original jurisdiction is exercised "sparingly." *United States v. Nevada*, 412 U.S. 534, 538 (1973). Resort to original jurisdiction is justified only in "appropriate cases." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). See also *Arizona v. New Mexico*, 425 U.S. 794, 796-97 (1976). In *Maryland v. Louisiana*, the Court observed that "what is 'appropriate' involves not only 'the seriousness and dignity of the claim,' but also 'the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.' " 451 U.S. at

739-40 (quoting *Illinois v. City of Milwaukee*, 406 U.S. at 93).⁸

Nebraska's proposed amendments satisfy the jurisdictional requirement for an actual controversy and fall within the ambit of the Court's discretion for accepting jurisdiction because matters alleged in Nebraska's Amended Petition are necessary to protect the State of Nebraska's equitable apportionment and its equities in unapportioned water from wrongful actions by the State of Wyoming. The proposed Amended Petition seeks to secure Nebraska's apportionment by fully enforcing the Decree, by adding injunctions to further implement the Decree, where they had previously been thought unnecessary, and by apportioning unapportioned natural flows. Without new injunctive and restrictions and the enforcement of existing injunctions, Wyoming, through reservoir construction, groundwater development, actions to reduce return flows, and failure to maintain complete and accurate water use records, would deplete the natural flows of the North Platte River in violation of the Decree and to the detriment of post-Decree equitable interests in Nebraska which have historically relied on the existing regimen of the river.

The Court should grant Nebraska's motion for leave to file this Amended Petition and exercise jurisdiction over this controversy for these reasons: 1) The Decree is being violated by Wyoming; 2) additional restrictions must be

⁸The circumstances in which the Court declines to exercise its original jurisdiction fall into two categories, i.e., political questions and the existence of an alternative forum. See Note, *Original Jurisdiction of the United States Supreme Court*, 11 Stan. L. Rev. 665, 694-700 (1959). The existence of an "adequate" alternative forum is not in issue here. See *Arizona v. New Mexico*, 425 U.S. 794, 796-97 (1976); *United States v. Nevada*, 412 U.S. 534, 538 (1973); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 495-99 (1971). The sole forum in which to allocate or enforce an interstate apportionment is the Supreme Court of the United States. There is no alternative forum. See *Texas v. New Mexico*, 462 U.S. 554, 567 (1983). Furthermore, this is not a political question.

placed on Wyoming to protect and effectuate the equitable apportionment established by the Court in 1945; 3) the North Platte River is over-appropriated during the non-irrigation season; 4) there is downstream reliance on non-irrigation flows jeopardized by actual and threatened development in Wyoming; and 5) the pending original action requires jurisdiction over non-irrigation flows to fully resolve these issues. In sum, the amendments are necessary to resolve the existing controversy.

POINT II

THE STANDARDS FOR ACCEPTING A PETITION DO NOT INVOKE THE BURDEN OF PROOF ON THE MERITS

In assessing this motion for leave to file, the standards for the exercise of original jurisdiction and the standards for relief on the merits must be kept distinct. Motions for leave were defined by the Court in *Ohio v. Kentucky*: "Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage." *Ohio v. Kentucky*, 410 U.S. at 644. This procedure tests the legal sufficiency of a petition by disposing of threshold legal issues.

The facts are not weighed by the Court on a motion for leave to file. Rather, the Court assesses whether the facts alleged, if true, present a claim of sufficiently serious magnitude for the exercise of original jurisdiction. The Court does not require "fact pleading," which specifies and supports every allegation in detail.⁹

By contrast, the traditional standard for relief on the merits in an original action is that there must be clear and convincing evidence establishing that the actions of a state are of a serious magnitude and fully and clearly proven before the Court will intervene and enjoin the actions of

⁹See, e.g., pleading pursuant to California's rules of procedure.

another state. See generally *Colorado v. New Mexico*, 459 U.S. 176, 187-88 n.13 (1982); *Colorado v. Kansas*, 320 U.S. 383, 393-94 (1943).¹⁰ This determination, however, is made by the Court after it has granted the motion for leave to file and after it has heard the evidence at trial.

When seeking to enforce a decree or compact, the plaintiff need not establish injury, but rather only that a violation of the decree or compact has occurred. *Nebraska v. Wyoming*, 113 S.Ct. at 1695. Accordingly, in a motion for leave to file in which decree or compact violations are alleged, a well pleaded allegation of compact or decree violations is sufficient to invoke the Court's jurisdiction.¹¹

A well pleaded action for equitable apportionment meets the Court's test for justiciability because it necessarily includes the concepts of an "imminent threat" of "serious injury."¹² The Court has repeatedly held that a fully appro-

¹⁰ *Accord Washington v. Oregon*, 297 U.S. 517, 522 (1936); *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Missouri v. Illinois*, 200 U.S. 496, 521 (1906).

¹¹ The Court's decision in *Nebraska v. Wyoming*, 113 S.Ct. 1689 indicates that the burden on a state seeking to enforce a decree is different from that involved in modifying a decree. To the extent that a modification involving "a request for recognition of new rights" is presented, "a higher standard of proof applies." *Id.* at 1695. In an enforcement action, however, "the plaintiff need not show injury . . ." The only question "is whether that conduct violates a right established by the decree." *Id.* The distinction is based on whether interference to sovereign interests occurs "in the first instance." *Id.* at 1696.

¹² There is no additional requirement that the state seeking an equitable apportionment must demonstrate that the threatened injury is "imminent" or attempt a factual showing of "necessity." Language to that effect in *Alabama v. Arizona*, 291 U.S. 286 (1934), arose in a completely different context. In that case, Alabama sought to enjoin five other states from enforcing their

cont'd

priated river in which downstream equities are threatened by actual or proposed upstream development necessarily invokes sovereign rights and creates the "clash of interests . . . which makes the controversy a justiciable one under [the Court's] original jurisdiction." *Nebraska v. Wyoming*, 325 U.S. at 610.¹³ Moreover, as the Court said in *Kansas v. Colorado*: "[T]he disagreement, coupled with its effect upon a stream passing through the two States, makes a matter appropriate for investigation and determination by this court." *Kansas v. Colorado*, 206 U.S. 46, 95-96 (1907).

Consequently, the Court has rejected the argument that factual issues must be fully developed in the preliminary stages of an original action. The weighing of untested evidence to determine success on the merits is not a factor in determining whether to grant a motion for leave to file. The Court does "not pause to consider the scope of the relief which it might be possible to accord on such a bill." *Kansas v. Colorado*, 185 U.S. 125, 145 (1902). The allegations in Nebraska's Amended Petition are of ample magnitude to require the exercise of the Court's original jurisdiction.

statutes against the sale of products made from prison labor on the ground that those states were depriving Alabama of its interstate market in prison manufactured products. The Court properly found the factual allegations of injury to be highly speculative and insufficiently pled. *Id.* at 291. The ruling has no precedential effect on the clearly discernable impacts arising from the competition for interstate water.

¹³See also *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Washington v. Oregon*, 297 U.S. 517 (1936); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Kansas v. Colorado*, 206 U.S. 46 (1907).

POINT III

**THE COURT SHOULD RESOLVE ALL ISSUES
RELATING TO WYOMING'S AND THE
UNITED STATES' VIOLATIONS
OF THE DECREE**

Counts I and II of this Amended Petition repeat allegations from Nebraska's Petition and contain allegations of additional violations of the Decree by the State of Wyoming and the United States of America.¹⁴ In Counts I and II, Nebraska seeks to protect and enforce its equitable apportionment established by the Court in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953).

Supreme Court Rule 17.2 states that the Federal Rules of Civil Procedure, "when their application is appropriate, may be taken as a guide to procedure in an original action in this Court." Under Fed. R. Civ. P. 15(a), leave to amend pleadings is freely given. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Insofar as amendments to a complaint or petition are concerned, the objective is to give the plaintiff "a chance to test his claim on the merits." *Middle Atl. Utils. Co. v. S.M.W. Dev. Corp.*, 392 F.2d 380, 384 (2d Cir. 1968). Accordingly, where the amended complaint or petition states a valid cause of action it should be granted. *See Granus v. N. Am. Philips Lighting Corp.*, 821 F.2d 1253, 1256 (6th Cir. 1987); *R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d 749 (10th Cir. 1975). This policy also extends to the introduction of an entirely new cause of action. *See* 3 J.W. Moore & R.D. Freer, *Moore's Federal Practice* ¶ 15.08 [2] (2d ed. 1990).

There must be a specific showing of substantial prejudice to deny an amended pleading. Under Fed. R. Civ. P. 15(a),

¹⁴The allegations of additional Decree violations are similar to allegations made in Count II of Nebraska's 1991 Amended Petition. They have been revised, however, to take into account Nebraska's better understanding of Wyoming practices as a result of discovery and changed circumstances.

"prejudice" affects a party's ability to present its case. As the court stated in *Cuffy v. Getty Refining & Marketing Co.*, 648 F. Supp. 802 (D. Del. 1986):

. . . [I]t is obvious that an amendment, designed to strengthen the movant's legal position, will in some way harm the opponent. In the context of a 15(a) amendment, prejudice means that the non-moving party "must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely."

Heyl & Patterson Intern., 663 F.2d at 426.

648 F. Supp. at 806. See also *Evans Prods. Co. v. West Am. Ins. Co.*, 736 F.2d 920, 924 (3d Cir. 1984).

No prejudice would result from accepting Nebraska's Amended Petition. Beginning with the Court's decision of April 20, 1993, on the cross-motions for summary judgment, the issues have evolved. Both Nebraska and Wyoming are filing motions for leave to amend their pleadings to account for the changed circumstances. Neither party will be prejudiced in preparing a defense for any of the proposed pleading amendments. Because of the necessary pre-trial schedule on the pending legal issues, all parties and *amici* will have more than a sufficient opportunity to investigate the factual claims and to gather evidence in support of or in defense against any new allegations. The introduction of additional matters in Nebraska's proposed Amended Petition will not deny any party a fair opportunity to defend against the allegations in the Amended Petition.

The allegations in Counts I and II are intended to protect and enforce Nebraska's equitable apportionment established by the Court in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953).¹⁵ The Court has

¹⁵Some allegations remain unchanged from the original Petition. Additional present and threatened development and depletions in Wyoming which upset the equitable apportionment have

held that enforcement of the equitable apportionment effectuated by the Decree is entirely within the purview of the Court's original jurisdiction pursuant to ¶ XIII. See 113 S.Ct. at 1695. Accordingly, Count I of this Amended Petition incorporates existing claims from Nebraska's Petition and adds related allegations requiring enforcement. The new allegations are as fundamental to the enforcement of Nebraska's apportionment as those accepted in 1987. They include significant present and future groundwater depletions, which in turn are depleting and will deplete the surface flows relied on by the downstream state, i.e., Nebraska. Count II adds allegations against the United States with respect to uses of Glendo storage water patently in conflict with the Decree. If the Amended Petition is filed, it will govern future proceedings.

The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), contained only those injunctions required to ensure that dependable and usable inflows would accrue to the Guernsey Dam to Tri-State Dam reach from upstream reaches to effectuate the apportionment of sufficient natural flows in the reach to meet the demand. The Court declined to impose additional injunctions in the absence of a contemporaneous threat of development. Because of present threatened development in Wyoming, it is now time to place additional restrictions on Wyoming's use of the North Platte River and its tributaries to protect the equitable apportionment established by the Court in 1945.

In original actions there is a compelling policy in favor of full development of the facts. See *United States v. Texas*, 339 U.S. 707, 715 (1950).¹⁶ The exercise of original jurisdiction should therefore be regarded as comprehensive, em-

¹⁶See also *Oklahoma v. Texas*, 253 U.S. 465, 471 (1920); *Kansas v. Colorado*, 185 U.S. at 144-45, 147 (1902); *United States v. Texas*, 162 U.S. 1 (1896).

bracing all issues in a cause of action.¹⁷ Wyoming and the United States will not be unfairly disadvantaged or deprived of an opportunity to present facts or evidence in response to these allegations. To the contrary, the Amended Petition will clarify the parties' rights and responsibilities and eliminate uncertainty related to the respective entitlements of the states to the waters of the North Platte River.

POINT IV

THE COURT MUST EQUITABLY APPORTION THE FLOWS OF THE LARAMIE TO PROTECT NEBRASKA'S APPORTIONMENT

Count III of the Amended Petition seeks an equitable apportionment of the irrigation season inflows of the Laramie River. Count III evolves from allegations in Nebraska's Petition and the Court's decision on the cross-motions for summary judgment.

In its opinion on April 20, 1993, the Court noted that "Wyoming and Nebraska both moved for summary judgment [with respect to the Laramie River inflows to the North Platte], taking diametrically opposed positions with respect to their rights to Laramie waters." 113 S.Ct. at 1697. In asserting their claims, each state articulated its

¹⁷The Court has been forced to revisit several controversies, including three equitable apportionment cases, to settle unresolved issues. See, e.g., *Oklahoma v. Texas*, 253 U.S. 465 (1920) and *United States v. Texas*, 339 U.S. 707 (1950); *Kansas v. Colorado*, 206 U.S. 46 (1907), *Colorado v. Kansas*, 320 U.S. 383 (1943), and *Kansas v. Colorado*, No. 105, Original; *Wyoming v. Colorado*, 259 U.S. 419 (1922), *Wyoming v. Colorado*, 286 U.S. 494 (1932), *Wyoming v. Colorado*, 298 U.S. 573 (1936), and *Wyoming v. Colorado*, 309 U.S. 572 (1940); and *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Nebraska v. Wyoming*, 345 U.S. 981 (1953), and the present case, No. 108, Original. The post-Decree resolution of omitted issues should be avoided here. Justice and equity, as well as judicial economy, require that the Amended Petition be allowed.

entitlement to the waters of the Laramie in terms of *res judicata*. Wyoming maintained that the Court apportioned all of the flows of the Laramie below Wheatland to Wyoming in *Wyoming v. Colorado*, 259 U.S. 419 (1922). Nebraska maintained that the Court apportioned all of the flows of the Laramie below Wheatland to Nebraska in *Nebraska v. Wyoming*, 325 U.S. 589, 667 (1945), *modified*, 345 U.S. 981 (1953); *see also* Doherty Report at 67 (Table III).

The Court concluded, however, that in establishing the equitable apportionment of the North Platte River, including its tributaries, "the Court [in 1945] apparently expected that some Laramie water would contribute to the natural flows available for apportionment in the pivotal reach" and that the "Laramie flows that actually have reached the North Platte [since 1945] have been included in the equitable apportionment . . ."¹⁸ 113 S.Ct. at 1698. The Court believed that "the evidence, most fairly read, did

¹⁸In adding the inflows from the upper reach at Whalen to the "[u]sable net accretions" between Whalen and Tri-State, Special Master Doherty stated that he was calculating "the total sectional natural flow fund" . . . to determine "what volume of water there [was] for apportionment . . ." Doherty Report at 70, 61.

The presumption that interstate apportionments necessarily involve a specified amount of delivery to the downstream state reveals a common misperception of the apportionment schemes in interstate compacts and decrees. *See* 113 S.Ct. at 1698. Of the 33 compacts and decrees defining interstate apportionments, only two compacts require a "specified amount of delivery." Colorado River Compact, 42 Stat. 171 (enacted 1921, signed 1922); Republican River Compact, 57 Stat. 86 (enacted 1943, signed 1942). Of the 12 interstate decrees, none apportions a specified amount of water. Most legal relationships in interstate water are premised on the recognition that the specification of a certain delivery is impracticable or impossible. Accordingly, no provision of the Decree in 1945 provides "a requirement of a specified amount of delivery to the downstream state."

not decide the fate of the excess Laramie waters in 1945."¹⁹
Id.

The Court indicated that to obtain relief on the Laramie, Nebraska must seek modification of the Decree. *Id.* at 1698-99. Wyoming's actual and threatened depletions of the unapportioned irrigation season flows of the Laramie River below Wheatland, combined with the historical reliance on the same flows by downstream equities in Nebraska, frame a case for equitable apportionment of the flows, which Nebraska seeks in proposed Count III, consistent with the Court's posturing of the case on April 20, 1993. *Id.* See *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Washington v. Oregon*, 297 U.S. 517 (1936); *Wyoming v. Colorado*, 259 U.S. 419 (1922).

Nebraska possesses numerous equities which have relied historically — and continue to rely — on the unapportioned irrigation season flows of the Laramie.²⁰ The primary Nebraska users of Laramie contributions to the North Platte River are the irrigators who divert in the over-appropriated Whalen/Tri-State reach. Return flows result

¹⁹The Court noted that "[t]he decree did not restrict Wyoming's use of the Laramie or require Wyoming regularly to deliver a specified amount of Laramie water to the North Platte confluence." 113 S.Ct. at 1698.

²⁰The Laramie River is the largest tributary in the Whalen/Tri-State reach. On the average, it is responsible for 29% of the natural flow accretions to the reach during the irrigation season. Between 1946 and 1992, the Laramie contributed an irrigation season average of 57,464 acre feet of natural flow to the over-appropriated Whalen/Tri-State reach. Of that amount, 75% has been made available to Nebraska appropriators pursuant to ¶ V of the Decree, i.e., 43,098 acre feet. See 345 U.S. at 985 (¶ V). Assuming a 10% incremental conveyance loss, Nebraska irrigators in the Whalen/Tri-State reach have historically diverted an annual average of 38,788 acre feet of Laramie flows during the irrigation season. In a system where the most senior appropriators have not had their natural flow needs met in 42 out of the last 46 years, the Laramie contributions are significant.

from these primary diversions, generating second and subsequent uses of the same water. See I W.A. Hutchins, *Water Rights Laws in the Nineteen Western States* 445-48 (1971). Secondary users composing the equitable reliance below Tri-State Dam in Nebraska include irrigators who utilize return flows, hydropower generation and power plant cooling users, municipal users, industrial users, recreation users, and fish and wildlife, including endangered and threatened species.

The annual associated economic benefits to the State of Nebraska from the Laramie contributions to the North Platte from primary uses in the Whalen/Tri-State reach are \$2.5 million in net returns to irrigators and \$13.6 million in economic activity resulting from the sale of agricultural products.

Equities in Nebraska that have historically relied and continue to rely on Laramie flows would suffer serious injury if the proposed Corn Creek Project were constructed. The Corn Creek Irrigation District encompasses 70,000 acres which are presently in dry land crops and rangelands. Water for the project is proposed from three sources — Grayrocks Reservoir, Glendo Reservoir, and a direct flow diversion from the Laramie River. The principal water supply for the project would consist of 22,500 acre feet per annum from Grayrocks Reservoir. Basin Electric Power Cooperative is obligated by contract to provide the proposed Corn Creek Project with 15,000 acre feet of water between April 1 and September 30, and 7,500 acre feet of water between October 1 and March 31, with no reduction for drought periods. An average annual water demand of 32,600 acre feet is projected for the proposed Corn Creek Project. Because of the local hydrogeologic conditions, none of the irrigation water would return to the North Platte River system.

Goshen Irrigation District ("Goshen") recently completed construction of a new permanent pumping station which replaces a low capacity pump that had been used intermittently near the mouth of the Laramie River. The

original river pump diverted an average of 271 acre feet per year or three cfs averaged over the irrigation season. Beginning this summer, Goshen's diversions from the Laramie River could reach 10,125 acre feet and eventually depletions of the Laramie River could skyrocket to 20,250 acre feet annually, significantly depleting the contributions of the Laramie to the critical Whalen/Tri-State reach of the North Platte River. Nebraska equities have historically relied — and continue to rely — on Laramie flows contributing to the Whalen/Tri-State reach. Goshen's new depletions would undermine the historical reliance by existing equities in Nebraska. Additionally, Goshen's pumping station would deplete the instream flow releases guaranteed by the Grayrocks Settlement Agreement.

Significant development of groundwater resources has occurred within the lower Laramie River basin since 1945.²¹ There are approximately 16,780 additional acres in the lower Laramie River Basin which have post-1945 permitted but unadjudicated groundwater rights. Some of these rights have been permitted as recently as May 1992. The exercise of these rights will cause depletions to the surface flows of the Laramie River and its tributaries. After enough time has elapsed and the aquifer system has reached a new steady-state, virtually 100% of the consumptive groundwater withdrawals in the area between Cottonwood Creek and the Laramie River will be reflected in stream flow depletions.

Subsequent to the entry of the Decree, Wyoming has allowed substantial depletions of the Laramie River below Wheatland in the form of new surface water appropriations. New agricultural uses could divert up to 11,790 acre feet of Laramie water for the irrigation of 3,930 acres of cropland. Industrial uses could divert up to 32,625 acre feet per year.

²¹The conjunctive management of surface and groundwater lies within the federal common law of equitable apportionment. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

Wyoming has also adjudicated post-1945 storage rights below Wheatland on the Laramie and its tributaries totaling 9,540 acre feet, exclusive of the 104,109 acre feet storage right of Grayrocks Reservoir.

The depletions caused by Wyoming's post-1945 adjudicated surface water rights could reach as high as 44,400 acre feet. There are over 4,000 additional acres for Whalen surface water rights from the lower Laramie River system which have been permitted but not adjudicated since 1945. Under Wyoming's statutes, an additional 12,000 acre feet of surface water could be diverted to serve these lands. The most recent of these rights was permitted in 1993. Nebraska equities have historically relied on the flows of the Laramie River, and Wyoming should not be allowed to deplete these flows causing injury to Nebraska's existing equities.

The Wyoming Water Development Commission has funded several projects on the Laramie River at and upstream of the Wheatland Project which have the potential to diminish the flows of the Laramie River below the Wheatland Irrigation District. They include projects associated with Lake Hattie, the rehabilitation of Wheatland Reservoir No. 1, the proposed construction of new storage in the upper Laramie River basin, the Pioneer Canal-Lake Hattie Irrigation District, and the lining of canals in the Wheatland Irrigation District.

In summary, Nebraska's proposed Count III properly seeks a modification of the Decree to apportion the irrigation season flows of the Laramie River below Wheatland, based on Wyoming's actual and threatened depletions of such flows, and historical reliance on the same flows by downstream equities in Nebraska.

POINT V

**CONFLICTING CLAIMS BETWEEN NEBRASKA
AND WYOMING TO AN
OVER-APPROPRIATED RIVER CREATE
A JUSTICIABLE ORIGINAL ACTION**

In Count IV, Nebraska seeks an equitable apportionment of the non-irrigation season flows of the North Platte River. In *Nebraska v. Wyoming*, the Court held that conflicting claims between states to a fully appropriated river in and of itself created a justiciable controversy under U.S. Const. art. III, §2:

... *Wyoming v. Colorado, supra*, indicates that where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination. If there were a surplus of unappropriated water, different considerations would be applicable. Cf. *Arizona v. California*, 298 U.S. 558. But where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States, we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction.

325 U.S. at 610. The holding could be construed as law of the case, applicable to future proceedings under the Court's retained jurisdiction. *Id.* at 671-72; compare *United States v. United States Smelting Ref. & Mining Co.*, 339 U.S. 186, 198-99 (1950).

Wyoming's actual and threatened depletions of the unapportioned flows of the North Platte River present the classic equitable apportionment conflict, i.e., the threat to downstream equities posed by upstream development. See *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Washington v. Oregon*, 297

U.S. 517 (1936); *Wyoming v. Colorado*, 259 U.S. 419 (1922). The Court summed up the situation in *Wyoming v. Colorado*:

The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, can not be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas v. Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right.

259 U.S. at 466.

During the non-irrigation season, all of the currently unapportioned water in the river below Guernsey Dam flows into Lake McConaughy.²² The reservoir has a capacity of nearly 2,000,000 acre feet, and is located in western Nebraska above the confluence of the North Platte and South Platte rivers. Kingsley Dam, which forms Lake McConaughy, was completed in 1941. The dam and reservoir were expressly planned and designed to capture the non-irrigation season flows, the return flows of the North Platte Project, and any other unused flows that were transported to that reach of the river. The average annual inflow into Lake McConaughy between 1946 and 1987 was 1,105,000 acre feet. Kingsley Dam is a structure through which all subsequent downstream flows are controlled. When Lake McConaughy does not have a sufficient water supply, downstream equities are adversely affected.

²²Guernsey, along with Glendo, Alcova, Pathfinder, and Seminole reservoirs, normally close their gates during the non-irrigation season in order to store natural flow for use during the irrigation season. Therefore, most of the accruals to the river above Guernsey Reservoir are captured by upstream reservoirs.

The primary sources of water entering Lake McConaughy are the inchannel natural flows from Wyoming that pass Tri-State Dam, the diversion dam just downstream of the Wyoming-Nebraska state line, and the return flows between Tri-State Dam and Bridgeport that result from the diversion of irrigation water above Tri-State Dam. The inchannel natural flows passing Tri-State are primarily accretions to the river below Guernsey Reservoir. The return flows which enter the river between Tri-State Dam and Bridgeport are derived primarily from diversions to canals at or above Tri-State Dam. When water is applied to farmland upstream during the irrigation season, part of the unused water percolates into the ground as part of the hydrologic cycle. The unconsumed water reappears in the river system downstream at a later point in time and is called return flow. During the non-irrigation season the inchannel flows averaged 197,400 acre feet for the years 1946-1987. Return flows in the Tri-State Dam to Bridgeport section of the river during the non-irrigation season were 342,400 acre feet on an annual average basis, 1946-1987. Thus the non-irrigation season inflow to Nebraska from Wyoming averaged 539,800 acre feet annually, 1946-1987.

Both Nebraska and Wyoming claim the right to use without limit the non-irrigation season water supply. There is insufficient water to satisfy all existing demands, aside from any proposed new depletions. The stresses on the system can no longer tolerate the failure to apportion the non-irrigation season flows.

Nebraska possesses a broad spectrum of equities dependent on non-irrigation season flows. These equities are jeopardized by actual and threatened developments in Wyoming. Traditional economic uses and fish and wildlife uses have developed in Nebraska based upon the unapportioned, non-irrigation season flows and the regimen of the North Platte River established by the Decree. From an economic standpoint, the most important is irrigation. Non-irrigation season water that is stored in Lake McConaughy is used

during the irrigation season to supplement or fully irrigate 230,000 acres of land each year. The associated annual economic benefits to the State of Nebraska are a \$16.1 million increase in net returns to the irrigators and a \$53.7 million increase in economic activity resulting from the sale of additional agricultural production.

Power production occurs during the irrigation season and during the non-irrigation season. There is a series of generating units which together generate an annual average of 550,000 megawatt hours of power worth \$8.2 million annually to electric consumers in Nebraska.

Municipal water use of the North Platte and Platte rivers is also critical in Nebraska. Various municipalities, including Grand Island and Kearney, have well fields in the alluvium of the rivers that draw water on an annual basis. Because of increasing groundwater contamination in areas where municipal well fields used to be located, more and more towns and cities are turning to the river for a fresh and uncontaminated water supply. At least periodic flows in the river are needed to assure dependable water supplies for municipalities. The unapportioned, non-irrigation season flows are an important component of the water supply for municipal and domestic uses.

Recreational uses also rely on the currently unprotected flows of the North Platte River and the regimen of the river as it presently exists during the irrigation season. Recreation related to the North Platte and Platte rivers and associated reservoirs is estimated to have generated 7.8 million visitor days per year. Platte River Valley recreation has been valued at \$34 million annually and produces new spending within Nebraska of \$16.2 million a year.²³

²³Monies received from visitors who come to Nebraska to witness the annual waterfowl and bird migrations are substantial. The Platte River is a major stopover point in the central flyway for scores of migratory birds during the spring and fall migrations. It is estimated that 80,000 people came to the Central Platte region to view the crane and waterfowl spring migration in 1991.

Finally, fish and wildlife are beneficiaries of unapportioned, non-irrigation season flows and the irrigation season regimen of the North Platte River. All water which currently flows into Nebraska is important to support minimum stream flows for the Platte River. The riparian habitat within a three-mile corridor within the reach between Lexington and Denman, Nebraska, has been declared as critical habitat for the endangered whooping crane. In addition, a larger 150 mile stretch of habitat along the Platte River provides an important habitat for seven other endangered or threatened species, as well as the staging area and migratory habitat for 80% of the world's sandhill crane population.²⁴ Decreased flow would cause habitat degradation and could cause the extinction of some species.

The average annual value of the equities in Nebraska that rely on the unapportioned, non-irrigation season flows and the irrigation season regimen of the North Platte River include \$16.1 million in increased net returns to irrigators, \$34 million in recreation benefits, \$8.2 million in hydro-power benefits, and an increase in state economic activity of nearly \$70 million per year from the spending associated with irrigation and recreation.

Nebraska's equities are threatened by Wyoming's proposals for upstream development which would utilize and consume non-irrigation season flows. Wyoming has a state funded Water Development Program administered by the Wyoming Water Development Commission. An express purpose of the program is to "develop and preserve Wyoming's water . . ." Wyo. Stat. § 41-2-112 (1977).²⁵ The

Estimated direct economic benefit from these visitors was about \$15 million, and the economic activity generated by this spending is estimated to be \$40.5 million.

²⁴Endangered and threatened species include the Whooping Crane, Bald Eagle, Least Tern, Piping Plover, American Burying Beetle, Eskimo Curlew, Western Prairie Fringed Orchid, and the Pallid Sturgeon.

²⁵To assure the success of the program, the State of Wyoming has assured that the program was well-funded. The program is
cont'd

program presently has \$67,000,000.00 available for appropriation and the Development Commission has recommended expenditures of \$24,000,000.00. With these abundant resources, the Commission has aggressively promoted water development projects in Wyoming in the North Platte River Basin, including the Laramie River.

Through formal discovery, Nebraska has become aware of numerous water development projects in Wyoming in the North Platte River Basin.²⁶ Wyoming describes the status of these projects as "under construction," "construction pending," "planning," "feasibility," "idea," "on hold," or "inactive." Some of these projects are the subject of the pending action and others are being monitored by Nebraska. However, given the number of proposed projects in the North Platte River Basin in Wyoming, the reason for Nebraska's apprehension is well-founded. Aside from Nebraska's apprehension, however, the present conflict between the downstream equities currently relying on non-irrigation season water and the proposed and threatened

funded through general appropriations and an excise tax on coal, oil, and gas. Total revenues since 1977 exceed \$433,000,000, and total expenditures exceed \$255,000,000.

²⁶Projects identified by Wyoming include the Bates Creek Project, Deer Creek Project, Box Elder Creek Project, Wagonmound Creek Project, LaBonte Creek Project, Horseshoe Creek Project, Corn Creek Project, McIntosh Project, Rawlins Project, Seminoe Enlargement, Robertson-McConnell Project, Edgerton Midwest Project, Sandy Lakes Project, Casper-Alcova Project, Horse Creek Project, Natrona County Regional Project, Tisthammer Project, and the Wy Coal Gas Project. Further, Wyoming has identified seven general water planning/development reports, seven reports related to the proposed Deer Creek Project, three reports related to the Seminoe Enlargement, five reports related to the Edgerton Midwest Project, three reports related to the Corn Creek Project, one report related to Sandy Lakes, three reports related to the Casper Alcova Project, one report related to the Horse Creek Project, one report related to the Natrona County Project, two reports related to the Tisthammer Reservoir, and one report related to the Wy Coal Gas Project.

upstream water developments in Wyoming make the need to equitably apportion the unapportioned, non-irrigation season flows imminent.

The rejection of Count I in Nebraska's 1991 Amended Petition was predicated on the Special Master's letter of April 9, 1992, to Justice White accompanying the Master's Second Interim Report. In that letter, the Special Master described Nebraska's position as "correct that the non-irrigation season flows have proven critical to the delicate balance of the river." See Master Olpin's letter to the Court Regarding Nebraska's Motion for Leave to File at 3. The Special Master nevertheless concluded that the motion was not ripe, although "[t]he time will likely come when a year around apportionment will be needed" *Id.* The facts now make it clear that the issue is now ripe for adjudication.

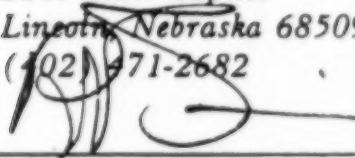
CONCLUSION

Nebraska does not lightly invoke the Court's original jurisdiction over its Amended Petition. The amended counts present allegations which are necessary to resolve the controversy, to provide certainty to the states and to the United States in their administration of the waters of this interstate stream, and to enable the Court to expeditiously dispose of an interstate conflict in the forum that exists for that purpose. The Amended Petition should be adopted to enable the entire controversy to be concluded.

Respectfully submitted,

DON STENBERG

*Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682*



RICHARD A. SIMMS

*Counsel of Record
Special Assistant Attorney General*

JAMES C. BROCKMANN

JAY F. STEIN

SIMMS & STEIN, P.A.

*430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-38802*

